

### **REMARKS**

Claims 1-49 were previously examined and claims 1-49 stand rejected. By virtue of this response, claims 1, 4, 15, 17, 18, 29, 33, and 34 have been amended, and claims 5, 19, and 35 have been cancelled. The amendments to independent claims 1, 15, and 29 incorporate the features of cancelled dependent claims 5, 19, and 35, respectively. The amendments to dependent claims 4, 18, and 34 are for clarity, e.g., to identify the scenario being discussed in light of the amendments to independent claims 1, 15, and 29, respectively. Further, dependent claims 17 and 33 are amended to match the amendments made to dependent claim 3 in response to the Examiner's earlier rejection under 35 U.S.C. 112, second paragraph. (see Non-final Office Action dated March 23, 2009; Response to Non-final Office Action dated June 18, 2009.) Accordingly, the above listed claim amendments are supported by the claims as originally filed and no new matter has been added. Claims 1-4, 6-18, 20-34, and 36-49 are currently under consideration.

For the Examiner's convenience, Applicants' remarks are presented in the same order in which they were raised in the Final Office Action.

#### **Claim Rejections under 35 USC §103**

**A.** Pending claims 1-4, 10-18, 24-29, 31-34, and 40-44 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Chmaytelli et al. (hereinafter Chmaytelli) (US Pub. No. 2002/0194325 A1) in view of Hamamoto et al. (hereinafter Hamamoto) (U.S. Patent No. 6,622,151 B1).

With respect to previously presented claim 5, which has been incorporated into claim 1 (and similarly with respect to claims 15 and 29), Applicants respectfully traverse the rejection. In particular, Applicants submit that the Office Action fails to present a case of *prima facie* obviousness. Specifically, and with respect to at least the amendment to claim 1, the proposed modification to Chmaytelli impermissibly changes its principle of operation and renders Chmaytelli unsatisfactory for its intended purpose. (MPEP § 2143.01.)

Each of the amended independent claims 1, 15, and 29 requires the selection of one particular previous upload transaction to estimate the transfer time when a match or likeness is found. In contrast, Chmaytelli teaches that the average of the historical information be used to calculate an estimated transfer time when data from more than one previous transfer is available. (*Id.* at paragraph [0069].) For example, when more than one previous data transfer rate is available, the principle of operation in Chmaytelli calls for averaging of the data transfer rate to calculate an estimated transfer time. (Chmaytelli at paragraph [0069].) Chmaytelli focuses on the problem of estimating the download time when “the data transfer rates for wireless devices are not constant and vary depending on different factors affecting the S/N ratio.” (*Id.* at paragraph [0013].) Chmaytelli addresses the variability of the data transfer rate by averaging when more than one previous data transfer rate is available. (*Id.* at paragraph [0069].) The process of averaging helps to provide a more accurate estimate of the download time. (*Id.* at paragraphs [0069], [0076].) Chmaytelli clearly states that “if there is more than one calculated data rate, the wireless device proceeds to calculate an ‘average’ data transfer rate ... .” (*Id.* at paragraph [0069].) The estimated time to download an application program is then determined by dividing the size of the selected application program by the calculated ‘average’ data rate. (*Id.* at paragraph [0070].)

Accordingly, the use of data from a *single previous transfer* to estimate the time for the current transfer, as claimed, is operationally inconsistent with the *averaging* required in Chmaytelli. Chmaytelli, therefore, cannot be used to render the present independent claims *prima facie* obvious. (MPEP § 2143.01.) This conclusion is further supported by the fact that Chmaytelli teaches away from using a single previous transfer to estimate the transfer time by requiring that an average of the historical data be used instead. (MPEP § 2145; Chmaytelli at paragraph [0069].)

In addition to impermissibly altering the principle of operation, modifying Chmaytelli to use data from a single past transfer when data from more than one past transfer is available renders Chmaytelli unsatisfactory for its intended purpose. (MPEP § 2143.01.) Providing a more accurate estimate of the estimated transfer time is one of Chmaytelli’s central goals. (Chmaytelli at paragraph [0011], [0012].) Specifically, Chmaytelli makes use of historical data transfer rate averaging to reduce the error in the calculated transfer time estimate. (*Id.* at paragraph [0069],

[0076].) Modifying Chmaytelli to use a single historical data transfer rate would lead to larger errors in the estimated transfer time arising from the variability of the historical data transfer rates. (*Id.* at paragraph [0013].) Hence, the proposed modification of Chmaytelli runs counter to its stated purpose and renders Chmaytelli unsatisfactory for its intended purpose.

Further, in regards to the rejection of claims 3, 17, and 33, Applicants submit that none of the cited references discloses correcting the transfer rate to improve the accuracy of the estimated upload time when transferring small files. (Original Application at paragraphs [0008], [0033].) The section in Chmaytelli cited by the Examiner in rejecting claims 3, 17, and 33 (e.g., page 2, paragraphs [0017]-[0018]) does not teach comparing the average transfer rate multiplied by one second to the average file size. (Final Office Action at page 5.) For example, the cited sections disclose the general scheme of estimating the download time based on historical data transfer rates. Accordingly, Applicants assert that the cited references fail to expressly or impliedly disclose the required claim elements in claims 3, 17, and 33, and the Examiner fails to “present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references.” (MPEP §706.02(j).)

Accordingly, for at least the foregoing reasons, one of ordinary skill in the art would not modify the disclosure of Chmaytelli in light of Hamamoto to meet the features of independent claims 1, 15, and 29. Claims 2-4, 10-14, 16-18, 24-28, 31-34, and 40-44 are allowable for at least the reason that each depends from an allowable independent claim. Claims 3, 17, and 33 are also allowable for the additional reason that the Examiner has not presented references that disclose all the required claim elements. Accordingly, the rejection should be withdrawn and claims 1-4, 10-18, 24-29, 31-34, and 40-44 allowed.

**B.** Claims 6-9, 20-23, and 36-39 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Chmaytelli et al. (hereinafter Chmaytelli) (US Pub. No. 2002/0194325 A1) in view of Hamamoto et al. (hereinafter Hamamoto) (US Pub 6,622,151 B1), and further in view of Nakamura (US Patent No. 6,751,795).

Nakamura fails to make the Claims 6-9, 20-23, and 36-39 *prima facie* obvious due to the deficiency of Chmaytelli in light of Hamamoto. Furthermore, the addition of Nakamura fails to cure the deficiency of Chmaytelli/Hamamoto. Therefore, Applicants submit that claims 6-9, 20-23, and 36-39 are allowable for at least the reason that each depends from an allowable independent claim. Accordingly, Applicants respectfully request reconsideration and allowance of claims 6-9, 20-23, and 36-39.

C. Claims 30 and 45-49 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Chmaytelli et al. (hereinafter Chmaytelli) (US Pub. No. 200270194325 A1) in view of Hamamoto et al. (hereinafter Hamamoto) (US Patent No. 6,622,151 B1), and further in view of Fredlund et al. (hereinafter Fredlund) (US Pub. No. 2003/005847).

Fredlund fails to make the claims 30 and 45-49 *prima facie* obvious due to the deficiency of Chmaytelli in light of Hamamoto. Furthermore, the addition of Fredlund fails to cure the deficiency of Chmaytelli/Hamamoto. Therefore, Applicants submit that claims 30 and 45-49 are allowable for at least the reason that each depends from an allowable independent claim. Accordingly, Applicants respectfully request reconsideration and allowance of claims 30 and 45-49.

**CONCLUSION**

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue. If it is determined that a telephone conference would expedite the prosecution of this application, the Examiner is invited to telephone the undersigned at the number given below.

In the event the U.S. Patent and Trademark office determines that an extension and/or other relief is required, applicant petitions for any required relief including extensions of time and authorizes the Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to Deposit Account No. 03-1952 referencing docket no. 324212003200. However, the Commissioner is not authorized to charge the cost of the issue fee to the Deposit Account.

Dated: November 12, 2009

Respectfully submitted,

By Electronic Signature /Christopher B. Eide/  
Christopher B. Eide

Registration No.: 48,375  
MORRISON & FOERSTER LLP  
755 Page Mill Road  
Palo Alto, California 94304-1018  
(650) 813-5720